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In The

Supreme Court of the United States

October Term, 1972

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Petitioner,

vs.

JO ANN RAINES, as Special Administrator of
the Estate of Thomas Raines, Deceased,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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Petitioner has filed a Reply Brief which is almost wholly devoted to charging Respondent with making untrue representations. In order that the Court might be apprised of the want of substance to such grave charges, Respondent is filing this Supplemental Brief.

Petitioner has represented that it was given a continuing objection to testimony of continuing inflation and that it did not introduce any evidence. (Reply Brief p. 1, 3)

THE PETITIONER WAS NOT GIVEN A CONTINUING OBJECTION TO TESTIMONY CONCERNING INFLATION

Petitioner states: "The Railroad did object and was given a continuing objection to testimony of continuing inflation." (Reply Brief, p. 1)

Our comment on the want of objection was prompted by Exhibit C (pp. 28a-30a) of Petitioner's Brief in which certain excerpts of multiple witnesses were referred to. The testimony excerpted from the witnesses, McKinley, Mullen and Tripple, was admittedly without objection.

Concerning Dr. Henderson the Reply Brief shows (p. 3) that the only matter about which there could be a claim of continuing objection involved Exhibits 92, 93, 94, 95 and 96. But none of these involved future wages or future prices. Actually there are but four, 93, 94, 95, 96. (A. 123) These were studies of what had occurred in the past.

Plaintiff's Exhibit 93 is a chart prepared from statistics of the United States Department of Labor (A. 123), including the consumer price index from 1914 to 1967.

Plaintiff's Exhibit 94 is a chart of the United States Department of Labor statistics (A. 125, 126), showing the earning of railroad workers from 1946 to 1966.

Plaintiff's Exhibit 95 is an official publication of a chart of the United States Department of Labor.

Plaintiff's Exhibit 96 is a table showing the hourly earnings of railroad workers from 1946 to 1966. (A. 126, 127, 129)

Nowhere does the record show the court either ordered or granted a continuing objection concerning testimony concerning future prices and wages, or Respondent so stipulating.

THE POST TRIAL MOTION

It is true that Paragraph 11 of the post trial motion alleges Dr. Henderson's testimony to be "immaterial, irrelevant and highly prejudicial to the defendant and pure speculation and conjecture." (A. 11-20) The testimony referred to is not spelled out as required by the Illinois Rules of Practice. This is particularly true when much of Dr. Henderson's testimony had to do with other matters Petitioner at no time complained of throughout this long appellate process.

Nor do Paragraphs 12 and 13 of the post trial motion cover this subject matters as Petitioner asserts. (p. 3, Reply Brief)

Paragraph 12 of that motion involves this witness' testimony pertaining to his estimates and speculation as to what would happen to interest rates and wages of railroad employees over the life expectancy of plaintiff . . ." But Dr. Henderson never gave any testimony whatsoever concerning future wages of railroad employees, let alone wages over the life expectancy of the plaintiff. Nor did he testify concerning future interest rates. Petitioner has never so contended.

Paragraph 13 of the post trial motion (A. 12) concerns Exhibits 93 to 96, inclusive, of which there has been no complaint throughout the entire appellate process.

THE RAILROAD INTRODUCED EVIDENCE OF SIMILAR CHARACTER

As both the Appellate Court (p. 21a Pn.) and the trial court (R. 721) noted, each party introduced interest rates and fluctuations in the market. Petitioner represents to the Court that it did not introduce any speculative testimony of inflation but states "the evidence offered merely showed the then cost of purchasing an annuity." (p. 4, Reply Brief) Here is what the record shows:

Mr. Thomas C. Smith, a self-anointed "estate engineer" (A. 181) stated under examination by counsel for Petitioner:

> "If I accepted that there would be an annual rise in salary or earning at 5%, then my salary would double in 13 years about. If I were making $5,000 a year it would be $10,000 in about 14 years to be exact, the money would double at 5% in 14 years."

The purpose of the cost of annuity was to avoid fluctuations in the market. (A. 188) This was directed to the issue of inflation.

As if that were not enough defendant introduced the following improper evidence concerning the return on investments of tax exempt institutions and improperly got before the jury the contents of an article from the Journal of Business.

> (Defendant's) "Exhibit 3 is an Article from the Journal of Business relating to this study. Page 9 of this exhibit, shows a study over a 35 year period. 1926 to 1960. It shows a rate of return of 9% for tax exempt institutions. By tax exempt institutions, I mean institutions that aren't subject to tax, that includes uni-

versities and so on. Institutions that invest their money in the stock market and are not subject to tax, such as universities get 9%. This exhibit shows that for tax exempt institutions, it was 9%. For persons in a $10,000 income class it would be 8.2% and it was 6.8% for persons in the $50,000 income class."

What *tax*-free foundations earned on their investments could possibly be no criterion of what an individual could obtain on his investment.

Equally incorrect is the statement: "The same waiver arguments now advanced by respondent were made and rejected by the Illinois Appellate and the Illinois Supreme Courts." (Reply Brief, p. 4) The opinions of those courts in Petition for Certiorari make manifest this inaccuracy.

We again submit this opinion of the Supreme Court of Illinois is in accord with the practice and procedures well established in that State, and in accord with applicable decisions of this Court. This is not an opinion of a court of appeals in conflict with the decision of another court of appeals on the same matter.

Respectfully submitted,

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